FILE COPY

FILED
JAN 7 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1948

No. 501

FREDERICK JOHN WOLFE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

SUBJECT INDEX

Table of Cases

Table of Statutes Cited

Miscellaneous Citations

IN THE

Supreme Court of the United States

October Term, 1948

No. .....

FREDERICK JOHN WOLFE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Frederick John Wolfe respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment of that court entered in this case on October 12, 1948; and therefore shows as follows:

I.

A summary and short statement of the matter involved.

This action involves the petitioner's United States income tax liability for the calendar year 1941. The United States Court of Appeals for the Ninth Circuit affirmed (R. p. 112) a decision favorable to the respondent in The Tax Court of the United States (R. p. 40).

(Hereinafter, in this Petition for Writ of Certiorari and Brief in support thereof, Imperial Oil Co., Ltd., a Canadian corporation (R. pp. 16, 19) will be referred to as "Imperial", Standard Oil Company of New Jersey will be referred to as "Standard", Standard Oil Export Company will be referred to as "Export", and Anglo-American Oil Co., Ltd., an English corporation (R. pp. 5, 13, 16) will be referred to as "Anglo".)

Petitioner is an individual (R. pp. 4, 5, 12, 13, 16), citizen of Canada (R. pp. 5, 13, 16). Petitioner has never been in the employ of Standard (R. pp. 68, 86) or Export (R. p. 68). From the time of his birth in 1879 and until 1931 petitioner was a resident of Canada (R. p. 16).

In June, 1902, petitioner entered the employ of Queen City Oil Co., Ltd. (R. pp. 16, 19, 29, 59, 64), a Canadian corporation (R. pp. 16, 59), which was, in 1911 or 1912, absorbed by Imperial (R. pp. 16, 19, 29, 59). Imperial was largely owned by Standard (R. pp. 29, 59, 60). Petitioner continued in the employ of Imperial until March 1, 1931 (R. pp. 16, 59), at which time he was Vice-President and a member of the Board of Directors (R. p. 59).

Two or three months prior to March 1, 1931, petitioner was requested by Mr. G. Harrison Smith, the Senior Vice-President of Imperial, to go to England and take over the duties of Managing Director of Anglo (R. pp. 16, 60, 73). Petitioner and Mr. Smith discussed the salary petitioner was to receive (R. pp. 17, 60-61). Petitioner told Mr. Smith he would go to England (R. p. 60).

Thereafter, and prior to March 1, 1931, petitioner had conversations with officials of both Standard (R. pp. 17, 60) (which controlled the stock of Export (R. p. 60)), and Export (R. pp. 17, 60) (which controlled the stock of Anglo (R. p. 60)). These conversations were had so that petitioner

might obtain knowledge of the background of Anglo (R. pp. 17, 60).

In none of petitioner's conversations, referred to in the two paragraphs immediately preceding, with officers of Imperial, Standard, and Export, was the question of petitioner's retirement pay in the event of his eventual retirement discussed. It was not mentioned in any way, shape or form (R. p. 61). Standard did not guarantee the payment of retirement pay to petitioner (R. pp. 73-74). Petitioner had nothing in writing to evidence the fact that he was being offered the position with Anglo and he never did have a written contract of employment (R. pp. 74-75).

While, as stated in the next preceding paragraph, petitioner did not discuss with anyone the matter of his retirement pay in the event of his eventual retirement, he knew that Anglo had a scheme or plan in existence for paying its retired employees. Petitioner did not know much about the actual details of the plan, but he knew that the basis of the plan was that an employee was entitled on retirement to roughly 2 per cent per year of service, based on a maximum of 75 per cent, and the average of the last 5 years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3 per cent (R. p. 17). Petitioner understood that he would be entitled to the benefits of this plan as an officer of Anglo, but this understanding of his was not based on any discussion of the matter with any officer of Imperial, Standard, or Export (R. p. 61).

On March 1, 1931, petitioner went to England (R. p. 59) and became Managing Director of Anglo (R. pp. 5, 13, 16, 23, 59, 73). In an English company the duties of a managing director are similar to those of an executive vice-president of an American corporation (R. p. 62). On July 1, 1931, petitioner also became Chairman of Anglo (R. pp. 5,

13, 16, 61). In an English company the duties of a chairman are similar to those of the president of an American corporation. Anglo had no president (R. pp. 61-62).

As heretofore stated, petitioner had assumed when he went to England that he would be entitled to the benefits of Anglo's superannuation scheme, which he knew to be in existence and the general basis of which he understood. After he arrived in England, he discovered that he was not eligible to participate in that plan because that plan required that an employee, to participate, must have been in the employ of Anglo in May, 1928. Furthermore, petitioner discovered that the funds of Anglo's superannuation plan were invested in stocks which he did not consider to be proper investments. The fund was not in a very sound financial condition (R. pp. 63, 65).

As a result of these discoveries, after March 1, 1931 and prior to October 22, 1931, petitioner discussed with other executives of Anglo the question of payments to be made to him in the event of his retirement from the services of Anglo (R. pp. 17, 29, 62, 64). Petitioner told these executives very plainly that he wanted to be considered on the same basis as those who were under the superannuation plan (R. pp. 17, 64). Petitioner also had a conference with certain officers of Standard. At this conference it was decided that "this question is to be deferred until the Anglo-American Oil Company has revised its annuity plan". It was recognized at the conference with Standard that if the proposed revision of Anglo's plan did not "fully take care of Mr. Wolfe's case", "the matter will have to be given special consideration at the proper time" (R. pp. 18, 80-81).

In the negotiations between petitioner and other executives of Anglo, referred to in the preceding paragraph, but not in the negotiations with officers of Standard, there was

also discussion of the length of time that Anglo was to consider that petitioner had been in its employ (R. p. 64). As a result of these discussions, it was decided that petitioner was to be treated as if he had been in the employ of Anglo from the date in June, 1902 when he entered the employ of the Queen City Oil Co., Ltd. (R. pp. 19, 64).

On October 22, 1931 the Board of Directors of Anglo adopted a resolution to dispose of both of the questions which had been raised by petitioner—namely, the question of whether petitioner would be considered on the same basis as those who were entitled to the benefits of Anglo's superannuation plan and the question of the length of time Anglo was to consider that petitioner had been in its employ. Said resolution was as follows:

> "Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd. (which was subsequently absorbed by the Imperial Co., Ltd., of Canada), and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof" (R. pp. 19, 64, 67).

On October 23, 1931 petitioner was formally advised of the adoption of said resolution by the Secretary of Anglo (R. p. 64).

Petitioner suffered from asthma. He had been advised by his physician on many occasions that England was not a proper climate for him and that when the opportune time came he should get out of England and go to a warmer country, such as California (R. pp. 65-66).

In 1939, petitioner began discussing the possibility of his retirement with the financial director of Anglo, a Mr. Carder. Petitioner told Mr. Carder that he intended, after his retirement, to live in the United States and that he would want his annuity payable to him in dollars. To that Mr. Carder was agreeable. They discussed the possibility of purchasing an annuity for the petitioner from an insurance company (R. p. 66).

Mr. Carder suggested that a solution to the problem might be for Anglo to pay a certain amount of money to Standard, the latter to pay the annuity (R. p. 66). Petitioner then discussed the matters he had discussed with Mr. Carder with an official of Standard (R. p. 67).

In the negotiations with Standard, various proposals were made. These proposals included payment to the petitioner by Standard "with a periodic billing of Anglo" (R. p. 91), the deposit by Anglo of funds with Standard from which payment would be made (R. pp. 20, 21, 82-83) and the purchase of an annuity by Anglo from an insurance company (R. pp. 66, 90-93). None of these proposals were ever carried out. On March 22, 1940 "an agreement of annuity" drawn by an official of Standard was entered into between Anglo (which executed the agreement in London (R. p. 58)), Standard and petitioner. (Standard and petitioner executed the agreement in New York (R. p. 58).) Under said agreement, Anglo paid to Standard the sum of £89,120 ($415,786.75 at the official rate of exchange) in consideration for which Standard agreed "to pay Mr. Wolfe (the petitioner) a life annuity of $3,038.75 per month". £89,120 was the capital sum representing "the liability which it (Anglo) would have incurred had it granted Mr. Wolfe (the petitioner) a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company" (R. pp. 23-26). The pertinent parts of said agreement of March 22, 1940 are set forth in Appendix A hereto.

Petitioner retired from the employ of Anglo on July 1, 1940. Beginning with a payment on July 31, 1940, petitioner has received $3,038.75 per month (or $36,465 per year) from Standard pursuant to the agreement of March 22, 1940 (R. p. 26). The $36,465 per year thus received from Standard is the equivalent of £7,293 converted at $5 to the pound. £7,293 is the maximum annuity petitioner could have demanded from Anglo on his retirement on July 1, 1940, under the resolution of October 22, 1931 (R. p. 67).

On December 11, 1940, an official of Standard requested another official of Standard to secure signature cards from petitioner "to whom we pay a special annuity" (R. p. 97).

During the time that petitioner served as an executive of Anglo, from March 1, 1931 to July 1, 1940, neither Standard nor Export ever dominated the administration policies of Anglo. Anglo bought oil and gasoline from Standard, but it also bought it from other people. The administration policies of Anglo were left entirely and absolutely in the hands of the board of directors of Anglo (R. p. 65).

From March 1, 1931, to October 4, 1941, petitioner was a resident of England, a non-resident alien with respect to the United States (R. pp. 5, 13, 16). On October 4, 1941, he entered the United States under the authority of an immigration visa intending to become a resident (R. pp. 5, 13, 71). From October 4, 1941, until the date of the trial of this cause before The Tax Court of the United States, petitioner was a resident of the United States.

Petitioner reported in his income tax return for the calendar year 1941, the sum of $3,041.51 as "income from annuities" with the following explanation:

> "The taxpayer receives an annuity from the Standard Oil Company of New Jersey, the payments being

> made at the rate of $3,038.75 per month. The payments received in 1941 during the taxpayer's residence in the United States totalled $8,822.18. The cash consideration paid to the Standard Oil Company of New Jersey totalled $415,786.75. The taxpayer is excluding from his gross income the amount of $5,780.67, representing the excess of the annuity payments received over three per centum of the principal amount for the period during which the taxpayer was a resident of the United States" (R. p. 71).

On December 11, 1944, the respondent mailed to petitioner a statutory notice of deficiency in the amount of $1,101.49 in income taxes for the year 1941 (R. pp. 4, 9-11, 12, 15). Said notice stated:

> "It is determined that the entire amount received by you from the Standard Oil Company of New Jersey during your residence in the United States constitutes gross income under the provisions of section 22 of the Internal Revenue Code. Accordingly, income from that source has been increased from $3,041.51 reported by you to $8,822.18" (R. p. 11).

A timely appeal from this determination followed (R. pp. 4-8). From an adverse decision of The Tax Court of the United States (R. p. 40), the petitioner appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed The Tax Court of the United States in a *per curiam* opinion (R. p. 111).

II.

A statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdicition to review the judgment of the United States Court of Appeals for the Ninth Circuit.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdiction to review the judgment of the United States Court of Appeals by reason of the provisions of Section 1254 of Title 28 of the United States Code (Public Law 773—80th Congress, Chapter 646, 2d Session).

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is October 12, 1948 (R. p. 112).

(2) The date upon which the petition for a Writ of Certiorari is presented is January ~~10, 1948~~. 7, 1949.

III.

The question presented.

The question presented is as follows:

Is the sum of $8,822.18 received by the petitioner from Standard pursuant to the contract of March 22, 1940 during the period October 4, 1941 through December 31, 1941 includible in petitioner's gross income for the year 1941 in full, or is only $3,041.05 includible in the petitioner's gross

income for 1941 in accordance with the provisions of section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code)?

IV.

The reasons relied on for the allowance of the writ.

The United States Court of Appeals for the Ninth Circuit affirmed the decision of The Tax Court of the United States in a *per curiam* opinion, assigning no reasons for its decision. We submit, however, that the necessary effect of the decision is to reach a result either in conflict with decisions of other United States Courts of Appeal or to decide an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States.

1. If the Circuit Court of Appeals for the Ninth Circuit adopted as the basis for its decision one of the reasons relied upon by The Tax Court of the United States, to wit, that the execution of the contract of March 22, 1940 did not result in income to the petitioner in 1940 (R. pp. 38-39), the decision is in conflict with the decisions of the Circuit Courts of Appeal for the First Circuit (*Hackett* v. *Commissioner of Internal Revenue*, 159 F. (2d) 121), for the Second Circuit (*Ward* v. *Commissioner of Internal Revenue*, 159 F. (2d) 502), for the Sixth Circuit (*Hubbell* v. *Commissioner of Internal Revenue*, 150 F. (2d) 516) and the Eighth Circuit (*Oberwinder* v. *Commissioner of Internal Revenue*, 147 F. (2d) 255). In each of the cases cited, it was held that the payment by an employer of the consideration for the issuance of an annuity contract for the benefit of an employee resulted in the receipt by the employee of gross income in the amount of the consideration so paid.

2. If the Circuit Court of Appeals for the Ninth Circuit adopted as the basis for its decision the distinction attempted to be made by The Tax Court of the United States between the *Hackett, Ward, Hubbell* and *Oberwinder* cases (*supra*) and the instant case, to wit, that they all involved "ordinary commercial annuity contracts purchased by employers from insurance companies for employees" (R. p. 40), the decision is in conflict with the decisions of the United States Courts of Appeal for the Fifth Circuit (*Ware* v. *Commissioner of Internal Revenue,* 159 F. (2d) 542), for the Sixth Circuit (*Beattie* v. *Commissioner of Internal Revenue,* 159 F. (2d) 788) and for the Seventh Circuit (*Raymond* v. *Commissioner of Internal Revenue,* 114 F. (2d) 140, certiorari denied 311 U. S. 710), and with its own decision in *Gillespie* v. *Commissioner of Internal Revenue* (128 F. (2d) 140). In each of the cases cited, it was held that annuities paid by other than commercial insurance companies were, nevertheless, subject to tax under section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) in the same manner and to the same extent as commercial annuities paid by insurance companies.

3. Finally, if the United States Court of Appeals for the Ninth Circuit adopted as the basis for its decision the conclusion of The Tax Court of the United States that "if the petitioner had not 'taxable income' in 1940 in the 'annuity' funds, he had nothing to recover tax-free later" (R. p. 39), the Court decided an important question of federal law—namely,

> That property constituting income under the tax laws of the United States received by a non-resident alien, not subject to tax in the United States, has a tax basis of zero,

which has not been, but should be settled by the Supreme Court of the United States.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable Court directed to the United States Court of Appeals for the Ninth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause to the end that the said cause may be reviewed and determined by this Court according to law; and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

Dated: January 7, 1949.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 170 F. (2d) 73 (see p. 111 of the Record). The opinion of The Tax Court of the United States is reported in 8 T. C. 689 (see pp. 14-40 of the Record).

Jurisdiction.

The grounds on which the jurisdiction of the Supreme Court of the United States is invoked are set forth beginning at page 9 herein, in the petition for writ of certiorari.

Statement of the Case.

The facts are as set forth, beginning at page 1 herein, in the petition for writ of certiorari.

Specification of Errors.

1. The United States Court of Appeals for the Ninth Circuit erred in finding and holding that the entire sum of $8,822.18 received by the petitioner from Standard during the period October 4, 1941 to December 31, 1941 under the contract of March 22, 1940 constituted gross income to the petitioner for the year 1941.

2. The United States Court of Appeals for the Ninth Circuit erred in failing to find and hold that only $3,041.51 of the sum of $8,822.18 received by the petitioner from Standard during the period October 4, 1941 to December 31, 1941 under the contract of March 22, 1940 constituted

gross income to the petitioner for the year 1941 under the provisions of section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code).

3. The United States Court of Appeals for the Ninth Circuit erred in affirming the decision of The Tax Court of the United States.

4. The United States Court of Appeals for the Ninth Circuit erred in entering judgment for the respondent.

Summary of the Argument.

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) provides that in the case of amounts received as an annuity under an annuity contract, there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity. The contract of March 22, 1940 between Standard, the petitioner and Anglo constituted an annuity contract. The aggregate premiums or consideration paid for such annuity was the sum of $415,786.75 paid by Anglo to Standard in consideration for Standard's agreement to pay an annuity of $3,038.75 per month to petitioner during his lifetime and to petitioner's wife for an additional year if she should survive him. The facts that the contract of March 22, 1940 was not a commercial annuity contract and that Standard is not an insurance company are immaterial.

The petitioner in 1940 was a non-resident alien and income received by him from sources outside the United States was not subject to tax in the United States. The fact that the petitioner did not, and was not, required to pay tax to the United States upon the income realized by him in

1940 by the execution of the contract of March 22, 1940 does not affect the manner in which the annuity payments to the petitioner under said contract in 1941 after he became a resident, are reportable under section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code).

ARGUMENT.

I.

The payment of $415,786.75 constituted "the aggregate premiums or consideration" paid for petitioner's annuity.

Section 22 (b)(2) of the Internal Revenue Code (Title 26 of the United States Code) as that section applied to the taxable year 1941 so far as pertinent † to this matter reads as follows:

> ". . . Amounts received as an annuity under an annuity . . . contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity . . . until the aggregate amount excluded from gross income under this chapter * or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. . . ."

It is clear that if, under the foregoing section, the aggregate premiums or consideration paid for petitioner's annuity was the sum of $415,786.75 paid by Anglo to Standard, the petitioner is entitled to exclude from gross

† For the convenience of the Court, section 22 (b), as that section applied to the taxable year 1941, is set forth in full in Appendix B.
* Chapter 1.

income the amount of his annuity in excess of an amount equal to 3 per centum of the amount so paid.

It is conceded that the petitioner himself made no payments toward the cost of the annuity. However, it cannot be questioned that Anglo paid Standard £89,120 or $415,786.75 (R. p. 26) and that Standard "agreed to accept the aforesaid £89,120-0-0 from The Anglo Company and to pay Mr. Wolfe a life annuity" (R. p. 24). The fact that the consideration was paid by Anglo and not by the petitioner does not prevent such payment from constituting "the aggregate premiums or consideration paid" within the meaning of section 22 (b)(2). That specific question was presented in *Hackett* v. *Commissioner of Internal Revenue* (159 F. (2d) 121, aff'g 5 T. C. 1325).

In the *Hackett* case, the taxpayer's employer in 1941 purchased an annuity contract for him. He contended that the consideration paid by his employer for the annuity did not constitute income to him in 1941 upon the ground, among others, that the consideration paid by his employer would not be considered as "consideration paid" for the annuity in determining the amount to be reported under section 22 (b)(2) when the annuity was paid in future years. The taxpayer argued that the phrase "the aggregate premiums or consideration paid for such annuity" in section 22 (b)(2) must be construed to mean "paid by the annuitant for such annuity".

The United States Court of Appeals for the First Circuit concluded that there should be included as a part of "the aggregate premiums or consideration paid" "not only direct payments but situations where in effect, if not in fact, the recipient paid the consideration". Since the employer had paid the consideration to the insurer, thereby conferring a benefit on the employee, and such payment

constituted gross income to the employee, it was determined that the payment by the employer did constitute "the aggregate premiums or consideration paid".

In its opinion in the *Hackett* case (*supra*), The Tax Court of the United States said:

> "In other words, in the *Freeman* case* we construed the words 'aggregate premiums or consideration paid for such annuity' to include payments by others on behalf of the annuitant in the form of compensation as well as by the annuitant himself. . . ."

The same holding is implicit in the decisions in *Oberwinder* v. *Commissioner of Internal Revenue* (147 F. (2d) 255 (C. C. A. 8), aff'g T. C. Memo. April 26, 1944), *Hubbell* v. *Commissioner of Internal Revenue* (150 F. (2d) 516 (C. C. A. 6), aff'g 3 T. C. 626) and *Ward* v. *Commissioner of Internal Revenue* (159 F. (2d) 502 (C. C. A. 2), aff'g T. C. Memo. November 29, 1945). In each of these decisions, it was held that an employee realized gross income upon the payment by his employer of the consideration for an annuity for his benefit. A holding that such payment by the employer did not constitute "the aggregate premiums or consideration paid" within the meaning of section 22 (b)(2) would result in the double taxation of the employee upon the same amount: First, when the employer paid the consideration; and Second, when the annuity payments were received.

We submit that, in the instant case, when the petitioner's employer, Anglo, paid to Standard the sum of $415,786.75 in consideration for Standard's agreement to pay an annuity to the petitioner, it conferred a benefit upon the petitioner, that the petitioner thereby realized gross income and that such payment constituted "the aggregate

---

* 4 T. C. 582, on appeal C. C. A. 2.

premiums or consideration paid" within the meaning of section 22 (b)(2). The only difference between the instant case and the decisions cited is that in those cases, the consideration was paid to a commercial insurance company, whereas, in this case, the payment by the employer was to Standard. The respondent has admitted that if Anglo had used the sum of $415,786.75 to purchase an annuity policy from an insurance company instead of paying that sum to Standard, the petitioner's contention would be correct since he stated on page 24 of his brief to the United States Court of Appeals for the Ninth Circuit:

> "If the facts of this case were altered and it appeared that Anglo had used the sum of $415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b)(2) of the Internal Revenue Code, *supra*. In that event the sum of $415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett* v. *Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Oberwinder* v. *Commissioner*, 147 F. 2d 255 (C. C. A. 8th); *Hubbell* v. *Commissioner*, 150 F. 2d 516 (C. C. A. 6th); *Ward* v. *Commissioner*, 159 F. 2d 502 (C. C. A. 2d)."

We submit that an attempt to distinguish the cases on the ground that Standard was not an insurance company has no basis in fact or reason. What real difference is there between a payment by Anglo of $415,786.75 in consideration of a commercial insurance company's promise to pay the taxpayer $3,038.75 per month and a payment by Anglo of $415,786.75 in consideration of Standard's promise to pay the taxpayer $3,038.75 per month? Taxation is stated to be "an intensely practical matter". (*Farmer's Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 212.) There

certainly is no practical difference between the two situations just mentioned. If the petitioner were here arguing that the contract of March 22, 1940 did not result in income to him in 1940, could he defeat the assertion that he did have income by merely pointing out that Standard is not an insurance company? We feel certain that such a defense would not be accepted.

Anglo conferred a benefit upon the petitioner when it bought Standard's promise as great as if it had bought the promise of a commercial insurance company. Certainly, there is no basis for preferring the promise of the most solvent insurance company over the promise of the Standard Oil Company of New Jersey, one of America's great companies.

An attempt to create a distinction on the ground that Standard was not an insurance company is utterly inconsistent with the decisions in *Raymond* v. *Commissioner of Internal Revenue* ((C. C. A. 7) 114 F. (2d) 140, certiorari denied 311 U. S. 710); *Ware* v. *Commissioner of Internal Revenue* ((C. C. A. 5) 159 F. (2d) 542); *Beattie* v. *Commissioner of Internal Revenue* ((C. C. A. 6) 159 F. (2d) 788) and *Gillespie* v. *Commissioner of Internal Revenue* ((C. C. A. 9) 128 F. (2d) 140) in which section 22 (b)(2) of the Internal Revenue Code was held to be applicable to annuity contracts issued by other than commercial insurers. As was stated by the Court in the *Gillespie* case (*supra*):

> "... That the contract was not labeled 'annuity contract' is immaterial. *Bodine* v. *Commissioner, supra.** ... It is likewise immaterial, if true, that the corporation was not authorized by law to make an annuity contract; for, whether authorized or not, such a contract was made and payments thereunder were received by the taxpayer...."

* 103 F. (2d) 982.

II.

The fact that the petitioner paid no United States income tax for the year 1940 is immaterial.

Throughout the year 1940, the petitioner was a non-resident alien (R. p. 16), and, as such, was required by law to pay income tax to the United States only with respect to income "from sources within the United States" (Section 211 of the Internal Revenue Code; Title 26 of the United States Code). Thus, the petitioner was not required to, and did not, pay a tax to the United States upon the receipt by him of the annuity contract of March 22, 1940.

In its opinion in this case, The Tax Court of the United States held, "if the petitioner had not 'taxable income' in 1940 in the 'annuity' funds, he had nothing to recover tax-free later" (R. p. 39). As authority for this conclusion, the Court cited its own opinion in *Charles L. Jones* v. *Commissioner of Internal Revenue* (2 T. C. 924) involving a taxpayer who was subject to tax in the United States for the year in which the annuity contract was purchased by his employer.

Whether the *Jones* case is a correct decision on the particular facts there involved is not material. The Court was, we submit, in error in holding in the instant case that the consideration paid by Anglo did not constitute "the aggregate premiums or consideration paid" for the petitioner's annuity contract because he had not paid a tax for the year 1940.

It is clear, we believe, that under the cases cited in Point I of this Brief, the payment by Anglo of $415,786.75 resulted in income to the petitioner in 1940, income upon which he would have been required to pay a tax if he had been a resident of the United States during that year, or if

such income had constituted income from sources within the United States. The fact that under section 211 of the Internal Revenue Code the petitioner was not required to pay a tax upon that income cannot obscure the fact that income was, in fact, received.

Certainly, the petitioner would not have been subject to tax in 1940 in the United States if Anglo had in 1940 paid the sum of $415,786.75 to a commercial insurance company. Yet, the respondent conceded in his brief to the United States Court of Appeals for the Ninth Circuit that such a payment would have constituted "the aggregate premiums or consideration paid" for the petitioner's annuity (see p. 18, *supra*).

Section 162 (c) of the Revenue Act of 1942 added to section 22 (b)(2) a new subparagraph (B) reading as follows:

> "EMPLOYEES' ANNUITIES.—If an annuity contract is purchased by an employer for an employee under a plan with respect to which the employer's contribution is deductible under section 23 (p) (1) (B), or if an annuity contract is purchased for an employee by an employer exempt under section 101 (6), the employee shall include in his income the amounts received under such contract for the year received except that if the employee paid any of the consideration for the annuity, the annuity shall be included in his income as provided in subparagraph (A) of this paragraph, the consideration for such annuity being considered the amount contributed by the employee. In all other cases, if the employee's rights under the contract are nonforfeitable except for failure to pay future premiums, the amount contributed by the employer for such annuity contract on or after such rights become nonforfeitable shall be included in the income of the employee in the year in which the amount is contributed, which amount together with any amounts contributed by the employee shall constitute the consideration paid for the annuity contract

> in determining the amount of the annuity required to be included in the income of the employee under subparagraph (A) of this paragraph."

The year here involved is of course 1941, and not 1942 or a later year. However, in supporting the contention there advanced by the respondent, both The Tax Court of the United States and the United States Court of Appeals for the First Circuit in *Hackett* v. *Commissioner of Internal Revenue* (5 T. C. 1325, aff'd 159 F. (2d) 121) held that the second sentence of subparagraph (B) of section 22 (b)(2) of the Internal Revenue Code was merely declaratory of previously existing law. That sentence specifically provides that the amount contributed by the employer shall constitute the consideration paid. There is nothing to indicate that the fact that the employee did, or did not, pay a tax shall have any effect.

The holding of The Tax Court of the United States on this point is equivalent to a holding that any property received by a non-resident alien from sources outside the United States shall have a tax basis of zero, a holding of wide application.

If the decision of The Tax Court of the United States in the instant case is correct, it necessarily follows therefrom that if a non-resident alien receives any property from his employer as compensation, the tax basis of such property is zero because no tax thereon was paid to the United States and that a subsequent sale thereof when such alien is subject to tax in the United States would result in the entire proceeds being subjected to tax. We submit that the theory invoked by The Tax Court of the United States in the instant case is a novel and startling one, finding no support in the provisions of the Internal Reveune Code or in the decided cases.

The provisions of the Internal Revenue Code relating to the determination of gross income and the recognition of gain and loss are of general application and not limited merely to citizens or residents of the United States. The fact that, under section 211 of the Internal Revenue Code, a non-resident alien individual is not required to pay a tax on income derived from sources without the United States does not affect the question as to whether he received income or realized a gain or loss on a particular transaction. We submit that when an alien becomes a resident of the United States, his tax liability must be computed in accordance with the provisions of the Internal Revenue Code and that the cost basis to him of property acquired prior to the time he became a resident must likewise be computed in accordance with the provisions of the Internal Revenue Code without reference to the tax laws of the particular country where he may have resided at the time the property was acquired or whether he was then subject to tax by the United States. There is no warrant in the statute or precedent for any other conclusion.

There is nothing in the Internal Revenue Code to indicate any intention upon the part of Congress to tax to an alien becoming a resident of the United States income in fact received by him while he was a non-resident and not subject to tax by the United States.

III.

The contract of March 22, 1940 was an annuity contract.

A substantial part of the opinion of The Tax Court of the United States (R. pp. 28-38) is directed to a discussion of whether the petitioner received an "annuity" or a "pension" or "benefits from a retirement fund". The entire

discussion of the Court is based upon an error of law and a misconception of the facts.

The fundamental error which The Tax Court has made is in failing to recognize that a pension is, in fact, a form of annuity and that pensions and annuities are for tax purposes treated alike. In the instant case, Standard in consideration of the receipt of $415,786.75 agreed to make definite and periodic payments throughout petitioner's lifetime and for one additional year if his wife survived him. Such an agreement constitutes an annuity contract under any accepted definition of the term. Paragraphs 1 and 2 of Section 46 of the New York Insurance Law read as follows:

> "1. 'Life insurance,' meaning every insurance upon the lives of human beings and every insurance appertaining thereto. The business of life insurance shall be deemed to include the granting of endowment benefits; additional benefits in the event of death by accident or accidental means; additional benefits operating to safeguard the contract from lapse, or to provide a special surrender value, in the event of total and permanent disability of the insured; and optional modes of settlement of proceeds.
>
> "2. 'Annuities,' meaning all agreements to make periodical payments where the making or continuance of all or of some of a series of such payments, or the amount of any such payment, is dependent upon the continuance of human life, except payments made under the authority of paragraph one."

The respondent's regulations (Section 29.22 (b)(2)-2, Reg. 111) define an annuity as follows:

> "Amounts received as an annuity under an annuity or endowment contract include amounts received in periodical installments, whether annually, semi-annually, quarterly, monthly, or otherwise, and

whether for a fixed period, such as a term of years, or for an indefinite period, such as for life, or for life and a guaranteed fixed period, and which installments are payable or may be payable over a period longer than one year. . . ."

In Solicitor's Opinion 160 (C. B. III-2, 60) the then Solicitor of Internal Revenue stated:

"... An annuity is defined in the following manner by Coke: 'An annuity is a yearly payment of a certaine summe of money granted to another in fee for life or yeares, charging the person of the grantor onlye.' (Coke's Littleton 144b (quoted with approval in Kent's Commentaries (14th edition), Part VI, page 460); Bouvier's Law Dictionary (Nalle 3d revision), 201.) However, the term has come to have a somewhat broader meaning, and designates a fixed sum, granted or bequeathed, payable periodically, but not necessarily annually, subject to such specific limitations as to its duration as the grantor or donor may lawfully impose. (3 Corpus Juris, 200.) The essential element is the certainty of the amount to be paid periodically at a certain rate per annum or in a certain aggregate annual amount. (*Peck* v. *Kinney*, 143 Fed., 76, 80.) It was said by the Supreme Court of the State of Ohio in the case of *Chisholm* v. *Shields* (67 Ohio State 374, 66 N. E., 93, 94) that 'an annuity, as understood in common parlance, is an obligation by a person or a company, to pay to the annuitant a certain sum of money at stated times during life, or a specified number of years, in consideration of a gross sum paid for such obligation.' An annuity, then, is a stated sum payable periodically at stated times during life, or a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation. . . ."

The amounts received by petitioner were amounts received as annuities under an annuity contract within any

of the definitions quoted above. In any event, the label "pension" or "annuity" is unimportant. In the ordinary case of a pension, the recipient may not exclude from gross income any part of the amount received, not because the pension is not a form of annuity, but because no consideration was paid therefor. However, where a consideration *is* paid, as for example where the employee makes some contributions to the pension fund, the pension payments received are taxed in exactly the same manner as any other annuity for which a consideration was paid. This is made clear by the following excerpt from a bulletin* issued by the Bureau of Internal Revenue:

> "The terms 'annuity', 'pension', and 'retirement pay' are often confused with each other. Sometimes these terms are used to describe a plan in which an individual invests some of his own money—either with an insurance company or with his employer—in order to assure himself that he will receive a steady income when he reaches a certain age. At other times, the same terms are used to describe payments which are made by an employer entirely out of his own funds to reward a faithful employee.
>
> "For income tax purposes, all of these plans are, in effect, treated alike so that the recipient of an annuity, pension, or retirement pay is allowed to recover his own investment, if any, tax-free but is required to pay tax on the remainder of the benefits that he receives, as explained in the first part of this article. Therefore, in those cases where the employer pays the entire cost of a pension, the retired employee has no cost to recover and his entire pension is taxable as if it were a payment of additional wages and salary."

---

* Your Federal Income Tax (1947 Edition), page 63.

Although the last sentence quoted refers to cases where the entire cost is paid by the employer, the Bulletin also makes plain that the sentence does not apply where before the employee's retirement the employer makes payments which constitute income to the employee at that time. Thus, it is said: *

> "Pensions or retirement pay received from employees' trusts should be treated in the same way as annuities. If the trust is one which meets the statutory tests for exemption from income tax, the amounts, if any, contributed by you as an employee constitute your basic cost of the annuity; if you made no payments to the trust, your cost is zero. If, however, the trust is not exempt from tax, contributions to the trust by the employer are treated as additional compensation to you as the employee, and are taxable to you when credited to the trust, if your rights to a future annuity would not be forfeited by your resignation or discharge occurring before the retirement date. Amounts thus taxed to you as the employee may be treated as part of your basic cost of the annuity."

The issue thus is not whether the payments are to be called a "pension" or an "annuity" but whether the payment by the employer to insure the "pension" or "annuity" for the employee constituted income to the employee at the time of payment. Although for the reasons stated it is believed that the label "pension" or "annuity" is unimportant, we think we should mention briefly some of the misstatements and half-truths running through the opinion of The Tax Court of the United States by which it arrived at the conclusion that there was a pension.

The Court found as a fact that:

> "Various procedures for paying the petitioner were discussed by Standard, Anglo, and petitioner.

* *Ibid.* page 63.

> Among them was a proposal to purchase an annuity for petitioner from a commercial insurance company. This proposal was never accepted or put into effect" (R. p. 19).

Nevertheless, the Court persists in quoting from correspondence during the entire period, with an utter disregard of which of the various procedures was being discussed. Thus, the Court twice quotes (R. pp. 33, 36) from a letter dated January 9, 1940 from Standard to Anglo in which reference was made to the money Anglo had provided "plus the additional amounts which Standard . . . will be required to put up". This then is assumed to establish that Standard is contributing to a retirement fund and would be required to put up additional money. Carefully, any reference is avoided to the letter three days later stating: "When I wrote you the other day, I failed to realize that you have a three-corner agreement. . . . This phase of the case has not been adequately considered" (R. p. 85). The later letter shows that the statements made in the letter of January 9 were made under a misunderstanding of the facts and were not accurate. Does the agreement of March 22, 1940 (R. pp. 23-26) require Standard "to put up" any additional amounts? The answer is "No". Standard, under that contract, received approximately $415,000 and became obligated to pay approximately $36,000 per annum. Standard assumed the risk, inherent in writing any annuity, that if the petitioner lived long enough, the payments to him would exceed the amount received. As compensation, it received the chance of a substantial profit if the petitioner did not survive. The petitioner would have to live more than 11 years before the $36,000 payments equalled the $415,000 received, and if any reasonable rate of income on the $415,000 is assumed, the period would be considerably lengthened. The petitioner has not yet lived even the 11-

year period, and there is no more basis for assuming that Standard will ever have to "put up" anything than there would be in assuming that an insurance company having issued the same contract would have to "put up" anything.

Similarly, reference is made by the Court (R. p. 37) to a statement in a letter dated June 29, 1939 that "it is further proposed that Anglo transfer to S. O. of N. J. for deposit to the sub-account for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability". The Court then concludes, "This has the sound of mere contribution by Anglo to a general fund, rather than purchase of annuity." All of which is true, except that it has nothing to do with the contract of March 22, 1940. On June 29, 1939, Mr. F. W. Pierce "proposed" a deposit to a sub-account at a time long before the annuity arrangement was agreed upon and clearly was one of the various plans considered but not consummated. Mr. F. W. Pierce, who wrote the letter of June 29, *1939*, was, incidentally, the same gentleman who on January 12, *1940* wrote that on January 9, *1940* he "failed to realize" what the arrangement then was (R. p. 85). At the time the letter of June 29, 1939 was written, the purchase of an annuity from an insurance company was another of the plans still being considered as is shown by the references in the letter to "insuring" the pension and "premium refund" (R. p. 83). Nevertheless, that letter is considered by the Court as evidence of what was the plan finally adopted.

The foregoing are merely illustrative of the errors made by The Tax Court in arriving at its conclusion that the amounts received by the petitioner were received as a pension. However, the Court's entire discussion on this point does not affect the basic legal question presented by this case: Whether the execution of the contract of March 22,

1940 resulted in the receipt of income by the petitioner in 1940. If that question is answered in the affirmative, as we believe it must, the label to be attached to the payments thereafter received by the petitioner is of no consequence.

Conclusion.

It is, therefore, respectfully submitted that the Petition for Writ of Certiorari should be granted as prayed for.

Respectfully submitted,

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

Appendix A (Agreement of March 22, 1940)

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,120-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of $3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of $3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a contribution toward the cost of the annuity settlement, the sum of £89.120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof (R. pp. 23-26).

Appendix B

Section 22 (b) of the Internal Revenue Code (Title 26 of The United States Code):

> *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:*
>
> (2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or an-

* Chapter 1.

nuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under paragraph (1) or this paragraph. The preceding sentence shall not apply in the case of such a transfer if such contract or interest therein has a basis for determining gain or loss in the hands of a transferee determined in whole or in part by reference to such basis of such contract or interest therein in the hands of the transferor.

FILE COPY

FILED
FEB 11 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1948

No. 501

FREDERICK JOHN WOLFE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

TABLE OF CASES

Statutes

IN THE

Supreme Court of the United States

October Term, 1948

No. 501

FREDERICK JOHN WOLFE,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

In his brief respondent (1) argues the merits of the case, and (2) argues that the decision in the instant case is not in conflict with decisions of United States Courts of Appeals other than the United States Court of Appeals for the Ninth Circuit.

As to respondent's argument on the merits.

The burden of the respondent's argument is that the resolution adopted by the Anglo directors on October 22, 1931 established the right of the petitioner to receive a pension from Anglo, that Anglo would have paid such pension

in sterling if the petitioner had continued to live in England and that the agreement of March 22, 1940 was the result of petitioner's wish to live in the United States after his retirement and to be paid in United States dollars. These facts are true, but do not lead to the conclusion which respondent suggests.

It is conceded that a promise by an employer to pay a pension to an employee does not result in income to the employee at that time, and that if, as, and when payments are made in accordance with such promise, the entire amount thereof constitutes income to the employee. It has been uniformly held, however, as evidenced by the cases referred to in petitioner's main brief, that where the employer instead of merely giving its own promise purchases the promise of a third party to make such payments, the amount paid by the employer for the third party's promise constitutes income to the employee at the time of such payment, and that the amounts thereafter paid to the employee by such third party are taxable to the employee in accordance with the provisions of section 22 (b)(2) of the Internal Revenue Code.

If the contract of March 22, 1940 had not been made, there would be no dispute; we would concede that any payments made by Anglo to the petitioner constituted income to him in full. However, the contract of March 22, 1940 *was* entered into. Under that contract, Anglo paid immediately the sum of approximately $415,000, the full actuarially computed value of its obligation to pay a pension. Anglo thus discharged in full, by an immediate payment, the liability which it otherwise would have had to pay a pension to the petitioner over a period of years in the future, a payment very much more than Anglo would have been required to pay if the contract had not been made and if the petitioner had died shortly after his retirement. The payment

by Anglo of approximately $415,000 was at the request of, and for the specific purpose of benefiting, its employee, the petitioner.

The argument of the respondent that since the petitioner already had an agreement under which he would receive a pension, the payment at his request of about $415,000 to purchase the promise of Standard to pay an equivalent amount to the petitioner in dollars could not constitute income to the petitioner is directly contrary and in conflict with the position urged by the respondent and accepted by the majority of The Tax Court of the United States in *Freeman* v. *Commissioner of Internal Revenue* (4 T. C. 582, on appeal C. A. 2). In the *Freeman* case, Freeman's employer (an individual) entered into an agreement whereby he agreed to pay Freeman $12,000 a year for the rest of his life, and if Mrs. Freeman survived to pay her $8,000 a year until her death, the agreement specifically referring to payments by the employer "(or my estate)". After the employer's death, the estate obtained a release from Freeman by the payment of about $8,600 in cash (the amount then due under the original agreement) and the payment of about $71,000 to an insurance company to purchase an annuity under which Freeman would receive about $6,000 a year. The respondent contended, and the majority of the Tax Court held, that the sum of $71,000 paid to the insurance company represented income to Freeman, despite the fact that he would receive, under the insurance contract, an annual amount considerably less than he would have received under the original agreement. Certainly, if an employee receives income upon the substitution of a third party's promise to pay him $6,000 a year for his employer's promise to pay him from $8,000 to $12,000 a year, an employee must be considered as having received income when his employer buys the promise of a third party to pay to the

employee an amount greater than the employer was previously obligated to pay.

The respondent relies heavily upon *Hooker* v. *Hoey* (27 F. Supp. 489 (S. D. N. Y.) affirmed *per curiam*, 107 F. (2d) 1016 (C. A. 2)). We have no quarrel with that decision and believe it was correctly decided. However, it has no bearing upon the issue here presented. In that case, the taxpayer was receiving a pension from the Vacuum Oil Company. In 1931, the Vacuum Oil Company sold all of its property to Standard Oil Company of New York, the latter company assuming all obligations and liabilities of the Vacuum Company, including the obligation of the Vacuum Company to pay a pension to the petitioner. The taxpayer contended that the amounts thereafter received from Standard Oil Company of New York were annuity payments. In rejecting that argument, the District Court assigned three reasons as follows:

> (1) There was no purchase of an annuity.
>
> (2) There was no annuity contract.
>
> (3) ". . . there is utterly no basis in the facts for the claim that the sum of $79,186.46 or any other particular sum was paid by Vacuum Oil Company to Socony Vacuum Corporation as 'aggregate premiums or consideration' for the latter's assumption of the obligation to pay the plaintiff $11,250 a year for life."

In the instant case, Anglo did, for the sum of $415,000, purchase a contract under which the taxpayer was to receive annual payments during his lifetime; there can be no dispute that the $415,000 was paid for that purpose and none other (R. p. 24). Consequently, none of the reasons assigned by the Court for its decision in the *Hooker* case is applicable here. The distinction between the *Hooker* case on the one hand and *Hackett* v. *Commissioner of In-*

ternal Revenue (159 F. (2d) 121) and the instant case on the other is obvious; in the *Hooker* case, the sale by the employer of its assets subject to its liabilities did not result in the employee receiving "an economic benefit conferred as additional compensation which is the equivalent of cash".[1] In the *Hooker* case, no contract was issued to the employee nor was there any basis for a contention that the transaction conferred any economic benefit on the employee as additional compensation. The purpose of the transaction was not to assure the payments to the employee, nor did Vacuum pay any particular amount to Socony in consideration of an agreement by the latter to make payments to the employee. In the instant case, there was a payment of a specific amount in cash ($415,786.75). It was specifically paid to purchase a contract under which the petitioner would receive an annuity for his lifetime. It was paid at the request of the petitioner and for the purpose of conferring a benefit upon him.

We wish to call to the Court's attention that the facts contained in the paragraph beginning at the bottom of page 5 of the respondent's brief regarding the proposal that the annuity be paid in New York in dollars and that Anglo transfer funds to Standard are based upon statements made by Mr. F. W. Pierce in a letter dated June 29, 1939 which, as pointed out on page 29 of our main brief, was written before any decision was made as to how the transaction was to be handled and by a gentleman who on January 12, 1940, more than six months later, wrote that on January 9, 1940 he "failed to realize" what the arrangement then was (R. p. 85). The agreement of March 22, 1940 constituted no mere deposit arrangement. Anglo had no further interest in the $415,000 whether the petitioner lived more or less than his life expectancy. Standard had received $415,000 which

[1] *Hackett* v. *Com'r* (159 F. (2d) 121, 123).

it was to keep whether the amounts paid to the petitioner proved to be very much more or less than that amount.

Respondent rests his argument in part on the erroneous finding of The Tax Court of The United States that Standard Oil Company of New Jersey in 1931 guaranteed the payment of petitioner's pension at $5.00 to the pound. This and related findings were assigned as error (R. p. 46), and were argued in the Court below. Rather than encumber this brief with a detailed discussion of evidence we append hereto excerpts from petitioner's brief in the Court below. No attempt was made by the respondent to answer these arguments in the Court below. It is, however, immaterial whether Standard did or did not guarantee the payments. Even if Standard did make a guarantee, it was unenforcible since not in writing (Section 31, New York Personal Property Law). Further, Anglo, the petitioner's employer, did in fact pay a consideration for Standard's agreement to pay the annuity pursuant to the contract of March 22, 1940, to wit, $415,786.75.

As to respondent's argument that there is no conflict in the decisions.

Respondent contends (p. 12 of his brief) that the decision in the instant case is not in conflict with *Hackett* v. *Commissioner of Internal Revenue* (159 F. (2d) 121), *Ward* v. *Commissioner of Internal Revenue* (159 F. (2d) 502), *Hubbell* v. *Commissioner of Internal Revenue* (150 F. (2d) 516), and *Oberwinder* v. *Commissioner of Internal Revenue* (147 F. (2d) 255) because in the cited cases—

(1) The employer purchased an annuity contract from an insurance company.

(2) The employee was still in service.

(3) The purchase price of the annuity contract was compensation to the employee.

(4) The employer did not set up a well defined pension plan.

(5) It was not argued that the installment payments were not annuities.

We will briefly dispose of these contentions.

(1) As to the fact that the annuity contract was written by Standard Oil Company of New Jersey and not by an insurance company, see paragraph 2 on page 11 of the Petition for Writ of Certiorari and pages 17, 18 and 19 of our main brief.

(2) As to the fact that in the cited cases the employee was still in service: The petitioner was also still in service. In the cited cases, as in the instant case, the annuity was in the nature of a pension.

(3) As to whether the purchase price of the annuity contract in the instant case was compensation to the petitioner, see pages 16 to 19, both inclusive, of our main brief. Respondent asserts without giving any reasons that "it could not reasonably be said that he (petitioner) received a bonus of $415,000, when his salary was £11,000 ($55,000) (R. 23, 67), and he worked only six months in the year of his retirement (R. 26)". Why not? In any event had the transaction occurred in the United States, it would have been held under the rationale of the cited cases, that the $415,000 was compensation to the petitioner.

(4) As to the fact that the employers in the cited cases did not set up "a well defined pension plan" the fact remains that in the cited cases the annuities were in the nature of pensions. Further, Anglo's pension plan was not one "with respect to which the employer's contribution was deductible under section 23 (p)(1)(B)" nor was Anglo

"exempt under section 101 (6)". See section 22 (b)(2)(B) of the Internal Revenue Code quoted on page 21 of our main brief. Consequently, the "amount contributed by the employer (Anglo) * * * shall be included in the income of the employee (the petitioner) * * * and shall constitute the consideration paid for the annuity contract * * *". Therefore, whether Anglo did or did not have a "well defined pension plan" is immaterial.

(5) As to the alleged fact that in the cited cases it was not argued that the installment payments were not annuities, the argument now made by the respondent was, however, made in the cited cases, namely that the annuities were pensions.

On page 13 of his brief, respondent argues that the decision in the instant case is not in conflict with *Ware* v. *Commissioner of Internal Revenue* (159 F. (2d) 542), *Beattie* v. *Commissioner of Internal Revenue* (159 F. (2d) 788), *Raymond* v. *Commissioner of Internal Revenue* (114 F. (2d) 140), and *Gillespie* v. *Commissioner of Internal Revenue* (128 F. (2d) 140) because the annuities in the cited cases were not in the nature of pensions. But it was contended in the cited cases that the annuities were not annuities (precisely the contention the respondent makes here) and the argument was rejected. The cases are in conflict in that in the instant case a similar argument was sustained.

Conclusion.

It is respectfully submitted that the petition for writ of certiorari should be granted as prayed for.

Respectfully submitted,

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
Attorneys for Petitioner.

APPENDIX.

2. *The Tax Court of The United States erred in failing to find as a fact that petitioner did not, prior to March 1, 1931, discuss with any official of Standard or Export the question of his retirement pay in the event of his eventual retirement, and that the question of petitioner's retirement pay in the event of his eventual retirement was never, prior to March 1, 1931, mentioned in the conversations between petitioner and officials of Standard and Export in any way, shape or form.*

Statement of wherein the findings of fact are, with respect to this the Second Specification of Error, erroneous.—On direct examination, petitioner testified: That prior to March 1, 1931, two or three months prior to that, Mr. G. Harrison Smith, who was the senior vice-president of Imperial, asked the petitioner if he (petitioner) would go to England to take over the duties as managing director of Anglo; that he (petitioner) had conversations with executives of Standard with respect to the matter of petitioner's going to England to take over this new position; that he (petitioner) talked with several of the executives; that he (petitioner) talked to Mr. Teagle, who was then president of Standard, to Mr. Hunt, who was one of the vice-presidents, to Mr. James Moffett, who was one of the vice-presidents, and to Mr. D. L. Harper, who was president of Export; that he (petitioner) talked to these gentlemen in Standard largely to get the background of Anglo (R. p. 60); that *he (petitioner) did not at any time discuss with Mr. Smith, Mr. Teagle, Mr. Hunt, or any of the other gentlemen whose names he had mentioned, the question of his (the petitioner's) retirement pay in the event of his eventual retirement; that the question of petitioner's retirement pay was never mentioned,—in any way, shape or form* (R. p. 61).

With respect to the first paragraph of the agreement of March 22, 1940, which provides that petitioner undertook the assignment as chairman and managing director of Anglo on March 1, 1931, on the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo and that payment would be guaranteed by Standard (R. pp. 23-24), petitioner testified that there was no understanding with any officer of Standard or Imperial; that the understanding stated in that paragraph was petitioner's understanding; *that he had not discussed the matter with any official of Standard or Imperial* (R. p. 61).

On cross examination, petitioner testified that he (*petitioner*) *had no understanding as to his retirement pay at the time he entered the employ of Anglo* (R. p. 73).

No evidence contradictory to the foregoing was offered at the trial; therefore there is no issue as to truth of the fact which The Tax Court of The United States failed to find.

It was error not to find such fact. The respondent's entire theory in this case is that Standard was not the writer of an annuity, that, on the other hand, Standard was, in entering into the contract of March 22, 1940, satisfying an obligation of Standard to petitioner. The fact that petitioner did not even discuss with any officer of Standard the question of his retirement pay is certainly pertinent to the issue of whether Standard had an obligation to petitioner with respect to that retirement pay.

3. *The Tax Court of The United States erred in failing to find as a fact that the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo and Standard, set forth in the eleventh paragraph*

of the findings of fact (R. pp. 23-24), *are true except that there was no understanding with any officer of Standard or of Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound.*

Statement of wherein the findings of fact are, with respect to this the Third Specification of Error, erroneous.— The undisputed evidence as to the truth of the facts stated in the paragraph beginning "Whereas" of the contract between petitioner, Anglo, and Standard (R. pp. 23-24) with respect to the alleged understanding with officers of Standard and Imperial that if petitioner were eventually retired from the service of Anglo he would receive a life annuity, etc. is set forth under specification of error 2. That evidence is all to the effect that there was no such understanding.

With respect to the alleged understanding prior to March 1, 1931, with officers of Standard that payment of such sterling pension would be guaranteed by Standard at an exchange rate of five dollars to the pound, the undisputed evidence is:

On direct examination the petitioner testified that he (petitioner) had always been a citizen of Canada (R. p. 59). As The Tax Court has correctly found as facts petitioner resided in Canada until 1931 and in England from 1931 to October 4, 1941 (R. p. 16). On cross examination petitioner testified that when he went to England in 1931 Standard did not guarantee the payment of a retirement to him (R. pp. 73-74). On direct examination, petitioner testified that:

he was a real sufferer from asthma and had been advised by his physician that when the opportune time came he should get out of England and go to a warmer country, such as California (R. p. 66); that prior to August 1939 he decided to retire (R. p. 65); that *after making the decision to retire,* he had conversations with an executive of Anglo in which he (petitioner) stated that he intended to live in the United States and that he would want his annuity payable to him in American dollars (R. p. 66), and that thereafter petitioner discussed the matter with an executive of Standard, in which discussion the executive of Standard particularly asked petitioner what the rate of exchange was that petitioner wanted (R. p. 67). On *June 16, 1939,* the same officer of Standard with whom petitioner had had said discussion wrote him (petitioner) that the problem of paying the annuity in dollars had been left for *future* consideration (R. pp. 87-88). A memorandum accompanying said letter of *June 16, 1939,* gave the amount of annuity due petitioner, assuming his retirement on various dates, *in pounds not in dollars* (R. p. 89). In a memorandum dated *June 21, 1939,* prepared by an employee of Standard, the annuity due petitioner, assuming retirement on various dates, was shown in dollars, *converted at $4.68 to the pound,* not at $5.00 to the pound (R. p. 92). In a memorandum from one executive of Standard to another dated *June 29, 1939,* it was stated as an understanding that petitioner was to receive a life annuity payable in the United States in dollars converted at the rate of $5.00 to the pound (R. p. 20) and that *subject to proper approval* it was proposed that the annuity be paid in New York in dollars, converted at the rate of $5.00 to the pound (R. pp. 20-21, 81-83).

From the foregoing undisputed evidence it is obvious that petitioner did not on *March 1, 1931,* undertake the as-

signment as chairman and managing director of Anglo on an understanding with officers of Standard that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo as in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.

It was error to fail to so find as a fact. The respondent's case depends in large part on the premise that Standard assumed an obligation to petitioner prior to March 1, 1931. That Standard assumed no such obligation is certainly pertinent.

4. *The Tax Court of The United States erred in finding as a fact that when the petitioner undertook the assignment of chairman and managing director of Anglo at the request of Standard it was the understanding that if he were eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement, and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of five dollars to the pound.*

Statement of wherein the findings of fact are, with respect to this the Fourth Specification of Error, erroneous.— The undisputed evidence with respect to this specification of error is set forth under specification of error 2 and specification of error 3. Every bit of that evidence negatives, rather than affirms, the finding of The Tax Court of The United States. For example, disregarding for the moment the direct denials of the petitioner, why should a citizen of Canada, who had always been a resident of

Canada, and who was taking a position in England, demand that an annuity to be paid to him on his eventual retirement from that position in England, be paid in American dollars? Or why, under such circumstances, should anyone guarantee the payment of such an annuity in dollars? It is quite apparent that the idea of paying the annuity in dollars arose from the advice of petitioner's physician that, because of his asthma, he go to a climate such as California (R. p. 66) and that there was *no* discussion of payment of the annuity in dollars until *1939*, when petitioner decided to retire and live in the United States (R. pp. 65-66). If Standard *in 1931* had had an understanding that petitioner on retirement was to receive his annuity in dollars converted at $5.00 to the pound, why did an officer of Standard *in 1939* ask what rate of exchange petitioner would expect? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars, why did an officer of Standard *on June 16, 1939*, write that the problem of paying the annuity in dollars had been left for *future* consideration? If Standard *in 1931* had an understanding that petitioner on retirement was to receive his annuity in dollars converted at $5.00 to the pound, why did Standard compute the annuity *on June 16, 1939, in pounds*, not in dollars? And why did Standard *on June 21, 1939*, compute the annuity at a rate other than $5.00 to the pound? If *in 1931* Standard had an understanding that petitioner, on retirement, was to be paid his annuity in dollars converted at $5.00 to the pound, why was it that *on June 29, 1939*, the proposal that the annuity be paid in New York in dollars, converted at the rate of $5.00 to the pound, was "subject to proper approval"?

. . . . . .

8. *The Tax Court of The United States erred in failing to find as a fact that the petitioner wanted an annuity payable in dollars because he had been advised by his physician on many occasions that England was not a proper climate for him and he intended to go to the United States upon his retirement.*

Statement of wherein the findings of fact are, with respect to this the Eighth Specification of Error, erroneous.— On direct examination the petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo; that he had been advised by his physician on many occasions that England was not a proper climate for petitioner; that petitioner was a real sufferer from asthma and had been advised by his physician that when the opportune time came, petitioner should get out of England and go to a warmer climate, such as California (R. p. 66); that after making the decision to retire, petitioner had conversations with Mr. Carder, who was on the board of directors and was financial director of Anglo; that petitioner told Mr. Carder that he (petitioner) intended to live in the United States; that petitioner told Mr. Carder further that when he retired (and he was planning on retiring) petitioner would want his annuity payable to him in American dollars (R. p. 66).

This evidence was undisputed. There is therefore no issue as to the facts in question.

It was error to fail to so hold. The facts in question are pertinent in that they show why the annuity was payable in dollars and in that they negative the fact, erroneously found by The Tax Court of The United States, that payment of the annuity in dollars had been guaranteed by Standard in 1931.

9. *The Tax Court of The United States erred in failing to find as a fact that in 1939 the financial director of Anglo suggested that the problem of the petitioner's annuity might be worked out by Anglo sending over a certain amount of money to Standard and that the latter would pay the annuity.*

Statement of wherein the findings of fact are, with respect to this the Ninth Specification of Error, erroneous.— On direct examination petitioner testified: That prior to August 1939, he decided to retire from his position with Anglo (R. p. 65); that after making the decision to retire, he had conversations with Mr. Carder who was on the board of directors and financial director of Anglo; that he told Mr. Carder that he (petitioner) intended to live in the United States; that he told Mr. Carder further that when he (petitioner) retired (and he was planning on retiring) he would want his annuity payable to him in American dollars; that he and Mr. Carder discussed the matter of his purchasing an annuity from an insurance company; and that then Mr. Carder suggested that it might be worked out by Anglo sending over a certain amount of money to Standard and the latter would pay the annuity (R. p. 66).

There is no evidence to the contrary. Hence there is no issue as to the facts in question.

It was error to fail to so find. The facts in question are material as showing how it happened that Standard paid the annuity to petitioner and as negativing the erroneous inference of The Tax Court of The United States that Standard in paying the annuity was satisfying an obligation incurred by it in 1931.

• • • • • • •

11. *The Tax Court of The United States erred in failing to find as a fact that the petitioner was never in the employ of Standard or Export.*

Statement of wherein the findings of fact are, with respect to this the Eleventh Specification of Error, erroneous.—On direct examination the petitioner testified: That he was never in the employ of Standard; that he was never in the employ of Export (R. p. 68). Kenneth N. Rackley, called as a witness on behalf of the respondent, who was, at the time of the trial, secretary of the annuities and benefits committee of Standard (R. p. 77), testified, on cross examination, that to his knowledge petitioner had never been an employee of Standard; and that when he spoke on direct examination (R. p. 86) of the official file of Standard relating to the retirement of petitioner (R. p. 80) as the employee's file, it was not his intention to characterize petitioner as an employee of Standard (R. p. 86).

There is no evidence to the contrary. There is no issue therefore as to the truth of the facts in question.

It was error to fail to so find. The fact that petitioner was never an employee of either Standard or of Export goes to the heart of this controversy. Standard could not, under such circumstances, have had an obligation to him as an employee.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 501

FREDERICK JOHN WOLFE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court of the United States (R. 14-40) is reported in 8 T.C. 689. The *per curiam* opinion of the Court of Appeals (R. 111) is reported in 170 F. 2d 73.

JURISDICTION

The judgment of the Court of Appeals was entered on October 12, 1948. (R. 112.) The petition for a writ of certiorari was filed on January 7, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the monthly payments received by the taxpayer after his retirement from employment under the circumstances of this case constitute compensation for personal service within the meaning of Section 22 (a) of the Internal Revenue Code and the applicable Treasury Regulations, or annuities taxable under Section 22 (b)(2).

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [as amended by Section 1 of the Public Salary Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid * * *.

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * *

(2) *Annuities, Etc.*—(A) * * * Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration

> paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *.
>
> * * * *
>
> (26 U.S.C. 1946 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

> SEC. 19.22 (a)-2. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients * * *.

STATEMENT

The facts as found by the Tax Court (R. 16-26) may be summarized as follows:

The taxpayer, a citizen of Canada, was a resident of England from 1931 to 1941, when he came to the United States. He filed an income tax return for the year 1941 in California. (R. 16.)

In 1902 the taxpayer entered the employ of an oil company (the Queen City Oil Company, Ltd.) which was afterwards absorbed by Imperial Oil

Company, Ltd. (hereafter referred to as Imperial), a Canadian company, the stock of which was largely held by Standard Oil Company of New Jersey (hereafter referred to as Standard). (R. 16.) In 1931 the taxpayer was requested by an officer of Imperial to go to England to take over the duties of the managing director of the Anglo-American Oil Company, Ltd. (hereafter referred to as Anglo), an English corporation. Anglo was controlled by the Standard Oil Export Corporation, which in turn was controlled by Standard. (R. 16-17.) Before accepting the appointment with Anglo, the taxpayer conferred with officers of both Standard and Standard Oil Export Corporation. (R. 17.)

It was agreed when the taxpayer undertook the assignment of chairman and managing director of Anglo, at the request of Standard, that if he eventually was retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement and that payment of such pension in sterling would be guaranteed by Standard in dollars at an exchange rate of $5 to the pound. (R. 17.)

In October, 1931, the board of directors of Anglo passed the following resolution (R. 19):

> Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Di-

> rector, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd., (which was subsequently absorbed by the Imperial Company, Ltd., of Canada) and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof.

In 1939 the taxpayer informed Anglo that he wished to retire and live in the United States and wanted his annuity to be paid in United States dollars at $5 to the pound. Various procedures for paying the taxpayer were discussed by Standard, Anglo, and the taxpayer. Among them was a proposal to purchase an annuity from a commercial insurance company, which however was rejected. (R. 19.)

In June, 1939, the officers of Standard took under consideration the payment of the taxpayer's "annuity", payable in United States dollars and converted at the rate of $5 to the pound. It was proposed that "the annuity be paid by New York in dollars" (R. 20); and in view of the uncertainties of the future [1] and in order to assure that the necessary funds be available in New York when needed, it was further proposed that Anglo trans-

[1] World War II started about two months after the proposal in question was made.

fer to Standard the estimated present value of Anglo's liability (R. 21). In August, 1939, Anglo paid Standard £87,177-0-0 which were converted into $408,097.33 in United States currency, and in December, 1939, Anglo paid Standard £1,943-0-0, which were converted into $7,689.42 in United States currency. The sum of the two payments is £89,120-0-0, or $415,786.76 at the then current rate of exchange (which was less than $5). (R. 26.)

The three parties entered into an agreement dated March 22, 1940, which recites that the taxpayer undertook the assignment of managing director of Anglo at the request of Standard on the understanding that if he eventually were retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo and that payment of such sterling pension would be guaranteed by Standard in dollars at an exchange rate of $5 to the pound. (R. 23-24.) The agreement provided that Anglo was to contribute to Standard £89,120-0-0, with the understanding that Standard was to pay the taxpayer $3,038.75 per month for the rest of his life, and the same amount to his wife for the year following his death if she survived him, and that the taxpayer accepted this annuity as a complete discharge of any and all pension obligations of Standard, Anglo, and any other associated companies. (R. 24-25.)

The taxpayer retired from Anglo on July 1, 1940, and thereafter received $3,038.75 per month from Standard which withheld the income tax on the monthly payments. (R. 26.) The taxpayer came to the United States on October 4, 1941 (R. 16), and received about $8,800 for the balance of the year 1941, but reported in his income tax return only about $3,000.[2] (R. 11.) The Commissioner determined a deficiency on the ground that the entire amount of about $8,800 constituted income. (R. 11.) The Tax Court upheld the Commissioner and the court below affirmed the decision of the Tax Court *per curiam*. (R. 40, 111.)

ARGUMENT

1. The decision of the court below, affirming *per curiam* the decision of the Tax Court, is correct. Section 22 (a) of the Internal Revenue Code, as amended, *supra,* provides that gross income includes compensation for personal service of whatever kind and in whatever form paid. This Court has placed a broad construction on this provision of the statute. *Commissioner* v. *Smith*, 324 U. S. 177, rehearing denied, 324 U. S. 695; *Old Colony Tr. Co.* v. *Commissioner,* 279 U. S. 716. Section 19.22 (a)-2 of Treasury Regulations 103, *supra,* p. 3, explaining Section 22 (a) of the statute, pro-

[2] The taxpayer made his return on the theory that the monthly payments were annuities, and consequently under Section 22 (b) (2) of the Internal Revenue Code, he was taxable only on 3% of the purchase price of the annuity, which he considered to be $415,000. (R. 71.)

vides in part that pensions or retiring allowances constitute income to the recipients. A similar provision has been in the Treasury Regulations since 1921.[3] The statutory provision defining gross income, to which the Regulations refer, having been repeatedly reenacted in substantially the same form, the Regulations now have the force and effect of law.

Applying these Regulations to the facts of this case, it is clear that the disputed sum constitutes a taxable pension or retiring allowance paid to petitioner. Within eight months from the time the taxpayer assumed his duties as managing director of Anglo in March, 1931, the board of directors of that company passed a resolution providing that he was entitled to a pension on the same basis as employees benefiting under the company's super-

---

[3] Article 32 of Treasury Regulations 45 (1920 ed.), promulgated under the Revenue Act of 1918, of Treasury Regulations 62 (1922 ed.), promulgated under the Revenue Act of 1921, of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 52 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 22 (a)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code; and Section 29.22 (a)-2 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

annuation scheme dated December 31, 1925, and that for the purpose of calculating the pension payable by that company to him, his services should be deemed to commence from June, 1902. (R. 19.) It was this resolution which gave rise to the taxpayer's right to a pension from Anglo and which determined the basis upon which the pension would be paid. Due to the fact that Standard guaranteed the payment of the pension in dollars at $5 to the pound (R. 17) and that the taxpayer wanted to live in the United States after his retirement and to be paid in United States dollars (R. 19), arrangements were made between Standard and Anglo whereby the latter in 1939 paid the former £89,-120-0-0 (R. 26), and the former undertook to pay the taxpayer $3,038.75 per month, effective July 1, 1940, for the rest of his life and a similar amount to his wife for twelve months following his death if she survived him (R. 24-25). There is no evidence in the record to show that Anglo would not have paid the taxpayer his pension in sterling if he had continued to live in England, nor is there any evidence that the taxpayer contributed or agreed to contribute one penny to the pension or retirement fund of either Anglo or Standard. In short, we have a case which fits squarely into the provision that pensions or retiring allowances constitute income to the recipient.

Hooker v. *Hoey*, 27 F. Supp. 489 (S.D.N.Y.) affirmed *per curiam*, 107 F. 2d 1016 (C.A.2d), in-

volves circumstances similar to those in this case. The taxpayer, an employee of Vacuum Oil Company, retired from active service in 1924, and by resolution of the board of directors was awarded $937.50 monthly, or $11,250 yearly, for the rest of his life. The taxpayer received $11,250 annually from his former employer from 1924 to 1931. In 1931, Vacuum Oil Company sold all its property to Standard Oil Company of New York, which assumed all obligations and liabilities of Vacuum. Thereafter, Standard made the payments to the taxpayer, including the sum of $11,250 paid in 1933 which the taxpayer claimed was exempt from income tax on the ground that it was an annuity.[4] The District Court decided, and was affirmed *per curiam*, that the sum in question constituted income for 1933 because it was a pension or retirement allowance under the statute and the applicable Treasury Regulations; and the fact that Standard took over Vacuum and made the payments after 1931 was held immaterial. While no specific sum of money passed from Vacuum to Standard in the

---

[4] Under Section 22 (b) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169, none of the amounts received under an annuity contract were treated as income until after the annuitant recovered his premium or other consideration. Under Section 22 (b) (2) of the Internal Revenue Code, *supra*, however, 3% of the total cost of the premium is included in taxable income, and the balance of the annual payments is excluded until the amounts excluded equal the cost of the annuity, after which all of the annual payments are included in gross income.

Hooker case comparable to the sum of $415,000 which Anglo paid to Standard in this case, it was argued in that case that assets equivalent to the worth of an annuity of $11,250 to a man 68 years of age (i.e. $79,186.46) were transferred in consideration of Standard's promise to pay the "annuity". Nevertheless, the court correctly held that the taxpayer received a pension and not an annuity in the *Hooker* case, and it would follow that the taxpayer received a pension, rather than an annuity, in the instant case; the taxpayer did not contribute to the pension fund in either case and therefore had no cost to recover.

The taxpayer argues that the basic legal question presented by this case is whether the contract of March 22, 1940, resulted in the receipt of income in the amount of $415,000 by the taxpayer in 1940, and that if this be so the monthly payments can only be taxed under Section 22(b)(2). (Pet. 29-30.) But he did not report this sum as income to any country in 1940 (R. 26, 38), and to say that he realized income in the amount of $415,000 by reason of the execution of the contract finds no warrant whatsoever in the record. The only purpose of the contract of March 22, 1940, was to arrange for the payment of the taxpayer's pension in New York in dollars. The resolution passed by Anglo's board of directors on October 22, 1931, fixed the taxpayer's right to a pension and the date on which his services were deemed to commence. (R. 19.) Prior to that

time, Standard guaranteed the rate of exchange, namely, $5 to the pound, at which the pension would be paid. (R. 17.) If the taxpayer had remained in England after his retirement, it is reasonable to assume that the contract of March 22, 1940, would never have been entered into; its sole purpose was to arrange for the payment of the pension in the United States and in dollars, and to fix the rate of exchange, namely, $5 to the pound.

2. There is no conflict of decisions. The taxpayer asserts a conflict between the decision in the instant case and *Hackett* v. *Commissioner*, 159 F. 2d 121 (C.A.1); *Oberwinder* v. *Commissioner*, 147 F. 2d 255 (C.A.8); *Hubbell* v. *Commissioner*, 150 F. 2d 516 (C.A.6); and *Ward* v. *Commissioner*, 159 F. 2d 502 (C.A.2). (Pet. 10, 16-18.) In all of those cases, the employer purchased an admitted annuity contract from an insurance company for the benefit of an employee still in service, and it was held that the premiums paid for the annuity constituted income to the employee on the theory that they were in the nature of additional compensation. In this case, the taxpayer retired in accordance with an established plan, and it could not reasonably be said that he received a bonus of $415,000, when his annual salary was £11,000 ($55,000) (R. 23, 67), and he worked only six months in the year of his retirement (R. 26). In none of those cases did the employer set up a well defined pension plan as did Anglo in this case, and in none of them

was it urged that the installment payments were anything but true annuities.

The taxpayer also asserts a conflict with *Ware* v. *Commissioner,* 159 F. 2d 542 (C.A.5); *Beattie* v. *Commissioner,* 159 F. 2d 788 (C.A.6); *Raymond* v. *Commissioner,* 114 F. 2d 140 (C.A.7), certiorari denied, 311 U. S. 710; and *Gillespie* v. *Commissioner,* 128 F. 2d 140 (C.A.9) (Pet. 11, 19). In none of these cases, also, was it contended, as here, that the annual payment made to the taxpayer was a pension, rather than an annuity; in fact, in none of these cases was the annuitant a former employee, nor had he rendered any pensionable service. They are substantially different from the instant case on their facts.

CONCLUSION

The decision of the court below is correct and there is no conflict of decisions. The case depends largely upon its peculiar facts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

FEBRUARY, 1949.

☆ U. S. Government Printing Office: 1949 J821979/377